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FROM USOECD

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SUBJECT: OECD REPORT: WORKING GROUP ON BRIBERY, HELD ON
JUNE 14-16, 2005

SUMMARY

1. On the June 14-16 meeting of the OECD Working Group on Bribery (WGB), the Tour de Table of recent enforcement developments (see Paras. 18-26) reconfirmed that the U.S. remains far and away the most aggressive enforcer of the foreign bribery offense. France was particularly disappointing, showing little interest in following up media reports about foreign bribery by French firms, or even a recent World Bank debarment action against a Thales subsidiary; the UK also provided little new information on various investigations underway. As part of its written follow-up report in response to Phase 2 review recommendations, Germany provided a list of foreign bribery cases, many of which have been closed (see Paras. 13-16). Norway also delivered a Phase 2 follow-up report (see Para. 17).

2. The WGB plenary considered the Phase 2 peer review examinations of Belgium and Sweden, giving both countries favorable assessments (see Paras. 8-12). The WGB recommended that Belgium amend its law to include an explicit prohibition of tax deductibility of "secret commissions" and do more to ensure that the business community understands that bribery of foreign public officials is a crime. While praising Sweden's efforts, the WGB made a number of recommendations for further improvements, including ensuring that the notion of a foreign public official under Swedish law includes all elected officials and agents of public international organizations, even those of which Sweden is not a member, and completing the reform of the system of liability of legal persons so that there are no obstacles to imposing corporate fines.

3. An informal meeting June 13 considered the Secretariat's initial draft outline of the Mid-term

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Study of the Phase 2 reviews. The U.S. welcomed the outline, but objected to inclusion of a focus on areas for further development, stating that the review should stick to identifying horizontal issues and common challenges drawn from a comparison of Phase 2 reviews conducted to date. The WGB Chairman agreed; France and the UK also supported the U.S. comments. The outline will be refined and completed in time for discussion at the next WGB meeting, in October. End summary.

MID-TERM REVIEW

4. The WGB held an informal meeting to discuss the Secretariat's annotated outline of the first part of

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the Mid-term Study of the Phase 2 Reviews. While discussions at the WGB meeting in March 2005 indicated the first part of the Study would analyze progress made in implementing the Convention, including positive developments and challenges, the Secretariat's draft outline also included a focus on "areas for potential development". In written comments submitted before the meeting and in verbal comments in the informal meeting itself, USDel stressed that the principal focus of the Mid-Term Review Study should be to identify horizontal issues and challenges that have been identified by the Phase 2 examinations, both for further discussion and to sharpen the focus of continued peer review. USDel stated that we do not believe there should be a focus on areas for further development, and noted that we did

not get the impression from the documentation prepared for the March WGB meeting and from plenary discussion at the meeting that there would be an intent to focus on such areas.

15. USDel indicated that the WGB could certainly attempt to draw conclusions on the basis of plenary discussion of the completed study, perhaps assisted by an ad-hoc drafting group, open to all parties. France and the UK supported the U.S. comments. In response, Chairman Mark Pieth said the clear view is that the Study should be largely retrospective and concentrate on the "positives and problems," i.e., focusing on what is working well and what is not working well. We don't need to solve horizontal issues now, he stated, but a list of such issues could be developed for the WGB to consider, and to lead into the next step of the planned review of the 1997 Revised Recommendation.

16. Verbal and written comments by Norway, Sweden, the UK and Australia were largely focused on process. USDel, while noting these comments, stressed that the procedures were in general working well. France supported the U.S., saying it is important the examination process be level. A number of delegations asked that the proposed recommendations included in the final Phase 2 report be circulated to the examined country and the WGB in advance of the plenary. For example, Denmark said the practice in some other OECD fora (like the Development Assistance Committee) is to make recommendations in advance, so that the examined country gets a first chance to respond.

17. Summarizing comments, Pieth said changes might be made to procedures if they did not affect the standards of the review process. In this regard, Pieth sees two areas for possible focus in the Study: technical-level changes, such as improving the questionnaire, and timing-issues, such as providing the text of the recommendations in advance. Pieth and OECD Anti-corruption Division Head Patrick Moulette urged delegates to send in further comments in writing.

PHASE 2 REVIEWS OF BELGIUM AND SWEDEN

18. Belgium: Lead examiners Switzerland and Argentina gave Belgium a generally favorable review, although the WGB strongly criticized Belgium for continuing to allow tax deductions for "secret commissions" in international business transactions and urged Belgium to impose a ban on such tax deductibility within one year. Chairman Mark Pieth firmly rejected a Belgian official's attempt to justify such tax deductibility in certain circumstances, stating that it was simply "not acceptable" and that in allowing such deductions Belgium was "endangering its entire message on corruption." On a more positive note, there are apparently four cases potentially involving foreign bribery under preliminary inquiry or investigation in Belgium. Belgium is also conducting a major review of the existing law on criminal liability of legal persons. Nonetheless, the examiners and several WGB delegates concerns raised concerns about how Belgian law defines foreign public officials. This prompted the WGB to recommend that Belgium consider adopting an autonomous definition instead of relying on the interpretation of the foreign country's law in order to bring its law into compliance with the OECD Antibribery Convention.

19. In its recommendations to Belgium, the WGB said Belgium also must work on publicizing the Convention, both within the Government and to the private sector, and advised Belgium to consider providing more resources for prosecutions. In addition, the WGB recommended that Belgium adopt improved whistleblower protection measures, and that Belgium take the necessary legislative measures to ensure that its extraterritorial and universal jurisdiction for bribery offenses committed outside of Belgium is adequate. The WGB committed to following up on several issues in the future, including whether the definition of bribery under the Belgian law encompasses "giving" an advantage and whether adequate resources are allocated for effective prosecutions of complex international bribery cases.

110. Sweden: The WGB praised Sweden for its implementation of the Convention, being one of the few countries, other than the U.S., that has actually obtained a conviction for bribery of a foreign public official. The case, involving kickbacks to World Bank officials, was actually prosecuted under Sweden's pre-Convention anti-bribery law and is currently under

appeal. Apparently Swedish law prohibited bribery of foreign public officials, although not expressly, before the Convention entered into force for Sweden. Other cases are currently under investigation. The WGB also commended Sweden for having adequate resources for prosecuting foreign bribery cases and a well-functioning system of cooperation and information sharing between law enforcement officials. Poland did an admirable job of as the apparent lead examiner; Iceland was the other examiner.

¶11. While praising Sweden's efforts, the WGB made a number of recommendations for further improvements, including further raising awareness in both the public and private sectors about the offense of bribery of foreign public officials; requiring auditors to report indications of possible illegal bribery acts to the board of directors and considering requiring such reporting to relevant law enforcement authorities; ensuring that the notion of a foreign public official under Swedish law includes all elected officials and agents of public international organizations, even those of which Sweden is not a member; completing the reform of the system of liability of legal persons so that there are no obstacles to imposing corporate fines and the maximum fines for bribery are appropriate (i.e., effective, proportionate and dissuasive) given the global importance of Swedish companies; and, ensuring that law enforcement and judicial authorities are aware of the penalty of confiscation of the proceeds of bribery. The WGB also committed to following up on several issues once Sweden has brought more cases, including the criteria for determining when bribery is aggravated or simple, prosecutions of legal persons where a natural person is not being prosecuted, and the application of nationality jurisdiction.

¶12. The complete reports for both Sweden and Belgium will be accessible on the OECD website within several months, at www.oecd.org.

PHASE 2 WRITTEN FOLLOW-UP REPORT BY GERMANY

¶13. Germany presented its written follow-up report to its Phase 2 Report. The original Phase 2 Report and accompanying Recommendations may be found at: <http://www.oecd.org/dataoecd/52/9/2958732.pdf> ; EB/OIA emailed the follow-up report to Embassy/Econ. Although Germany is revising its current laws and has made several improvements, the WGB noted several remaining concerns that it will need to monitor as the case law develops, including Germany's application of its antibribery laws to corporate entities (Germany does not provide for corporate criminal liability but only administrative fines under its legal system). The German follow-up report states that Germany is currently revising its antibribery legal framework under a new Draft Act on Combating Bribery, which will incorporate Council of Europe as well as new EU requirements and obligations of the UN Convention. The Draft Act will repeal Germany's current legislation implementing the OECD Convention and transfer such offenses to the Criminal Code. According to the German report, the legislative procedure is expected to be complete by end 2006.

¶14. The report elaborates on steps the Government and (separately) several business associations have taken to raise awareness about the Convention and the German implementing legislation among both the business community and judges and prosecutors. In addition, Germany reportedly sent information to missions abroad, including written training programs to increase awareness of bribery offenses.

¶15. German enforcement of the foreign bribery offense has been complicated by the fact that in general investigations and prosecutions are done by the Lander; for example, Germany claims it can only report the number of investigations and prosecutions once a year because it only receives such information from the Lander annually. The follow-up report notes that the federal authorities have developed a Central Public Prosecution Register, and the report provides a detailed annex outlining a long list of cases. Germany said the Justice Ministry has drafted amendments to the guidelines on criminal and administrative proceedings to provide more guidance to prosecutors in applying the laws relating to the responsibility of legal persons. The lead examiners, Austria and Japan, nonetheless raised several remaining concerns, including whether the Lander really had sufficient resources, the time lag in conducting tax audits and the relatively low

penalties for legal persons of up to Euro 1 million, given the size of German companies and exports in the global market. (Note: USDeI queried the German representatives on the margins and confirmed that German law also afforded the possibility of fining the company up to twice the amount of the bribe proceeds, although if the bribe was promised but not actually paid this penalty obviously would not appear to apply. End note)

¶16. USDeI commended the GOG on the impressive number of cases currently under investigation as well as for establishing a central register, but asked whether the German delegates to the WGB would be able to consult it more regularly. The German delegate responded that because the registry information is secret and the Federal Government is not a prosecuting but a law making body, it does not have access to the registry. They reiterated that the Federal authorities receive such information only once a year for the purpose of reporting to the OECD WGB.

PHASE 2 ORAL FOLLOW-UP REPORT BY NORWAY

¶17. Norway provided a comprehensive Phase 2 oral follow-up report and the lead examiners generally expressed satisfaction with Norway's implementation and enforcement of the convention. Norway is issuing a booklet on the corruption provisions of the penal code, which will be distributed to all foreign missions and Norwegian small and medium enterprises operating in foreign markets. Norway is considering a new act on whistleblowers, which is at the drafting stage and is being hotly debated (this is viewed as important by the examiners pursuant to the Phase 2 recommendations). The Norwegian delegate explained that Norway has established a tax unit to investigate tax crimes and related issues and has issued instructions to all tax authorities on how to communicate bribery matters. One of the WGB's recommendations in Norway's Phase 2 report was that the authorities needed to communicate to its business sector that facilitation payments are not allowed under Norwegian law; the Norwegian delegate expressed surprise at the existence of this recommendation (as did USDeI, since facilitation payments are permitted under the U.S. Foreign Corrupt Practices Act) but said that Norway will comply by mentioning this in its new booklet (see above).

Tour de Table:

¶18. As agreed by the WGB at the March meeting, the Tour de Table review of country implementation and enforcement efforts focused on a summary matrix of cases compiled from public sources by the OECD Secretariat. Posts can request copies of the Tour de

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Table summary of foreign bribery cases derived from press reports by contacting EB/IFD/OIA, email: brownpa@state.gov. (Note: Not all of the information in the matrix is accurate or authoritative, but it is a useful tool to track allegations of bribery of foreign public officials. End Note.)

¶19. Most countries gave only brief reports and many asked that the listed cases from press reports be removed as they were lacking evidence and therefore not being pursued. Several countries reported either having signed or ratified the United Nations Convention Against Corruption, and most EU countries informed the group about their implementation of COE and EU anticorruption instruments. After going around the table for updates, Chairman Mark Pieth suggested that the WGB take a closer look at multi-jurisdictional cases, such as the TSKJ / Nigeria case, which touches quite a few OECD countries (although only the U.S., France, the U.K. and Switzerland are conducting investigations), as well as the Alcatel / Costa Rica case. He commented that perhaps multi-jurisdictional cases would make a good topic for a special "prosecutors' meeting" in addition to normal WGB meetings.

¶20. USDeI addressed several recent enforcement actions pursuant to the Foreign Corrupt Practices Act (FCPA), including the Diagnostic Products Corporation (DPC)/(China) case. The case involved DPC and its wholly owned subsidiary, DPC (Tianjin) Ltd., a Chinese company, which sell medical devices and testing equipment. DPC (Tianjin) Ltd. pleaded guilty to violating the FCPA by paying \$1.6 million in bribes

over a ten-year period to doctors and procurement officials of state-owned hospitals in China. DPC (Tianjin) Ltd. was sentenced to pay a \$2 million criminal fine, and parent company DPC will pay \$2.8 million, of which approximately \$2 million is disgorgement representing the company's net profit in China from its misconduct, under a previously agreed cease and desist order from the U.S. Securities and Exchange Commission. USDel also confirmed the existence of numerous Department of Justice and SEC investigations reported in the press and listed in the Secretariat's matrix.

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21. USDel again reminded the representative from the Netherlands that the U.S. is still seeking extradition of a Dutch national for FCPA violations; while the Dutch Supreme Court approved his extradition, the Ministry of Justice appears to be blocking the extradition. As usual, the Dutch representative had no response other than that she would relay the message to capital. USDel further reported that the Justice Department had given presentations at various anticorruption conferences, including one in Paris and one on the FCPA in New York. The Justice Department has also participated in several web casts on the topic for continuing legal education purposes and five more are scheduled. USDel also noted that the Justice Department has completed a pilot program for compiling international cases, which it hopes to have up and running by this summer.

22. France provided a disappointing, minimalist update, saying that three cases remain under investigation; the French delegate said many of the cases listed in the Secretariat-prepared matrix either do not fall within the ambit of France's law implementing the Convention or simply that France is not aware of the case. USDel took issue with France's lack of a response, specifically asking for more details of French actions with respect to the Alcatel / Costa Rica case. France stated that it is watching developments concerning the case but had no news to report beyond its last update on the subject. Concerning the Thales Engineering and Consulting / Cambodia case, which involves blacklisting of the company by the World Bank: the U.S. pointed out that France should at least ask the World Bank for further information about the case, instead of doing nothing and assuming that the World Bank sanctions are enough. When asked about other cases by the Chair, France responded that if other countries are already investigating, there is no need for France to do anything.

23. Similarly, the U.K. reported that the Serious Fraud Office was either unaware of several of the cases listed in the Secretariat's report or there was no evidence to support them concerning UK involvement. When asked by the U.S. for an update on the TSKJ / Nigeria case the U.K. responded that it had no updated information. The ongoing investigation into the BAE case involves several countries. The U.K. further reported that it is participating in various outreach activities to several countries, including in events in East Asia on awareness raising for the private sector and for U.K. missions. It held a conference for its Overseas Territories on the Convention, and a meeting on a Memorandum of Understanding of how to handle cases with the Serious Fraud Office.

24. Japan reported that it was seeking information on the (TSKJ / Nigeria) case, but provided no further information on it or any other cases. Japan further reported that the Bill for raising penalties for national persons is under consideration in the Diet and it is hoped that it will be passed in a few weeks. Korea, on the other hand, reported that it is monitoring several cases (although most involve bribery of U.S. military procurement personnel in Korea), has requested mutual legal assistance in others, and has prosecutions under way. Korea noted that it is hosting two upcoming events this year: an APEC Anticorruption Task Force Meeting and an Anticorruption and Transparency Symposium in September.

25. Australia stated that there are two potential foreign bribery matters under consideration and another is being looked at, but all are confidential at this point. Austria reported that on June 7 it adopted the bill on criminal liability, which should enter into force in January 2006. Brazil reported that the National Congress and the Parliament had ratified the United Nations Convention Against Corruption in May. It is also considering three bills to implement WGB

recommendations, concerning international mutual legal assistance, the duration of the statute of limitations (which may be increased up to 12 years) and legal liability. Turkey reported that it has a new Criminal Code, which entered into force on June 1. The new text now contains provisions on the coverage of international officials. The Slovak Republic reported that its on-site visit was conducted in May. It also has new criminal and procedural codes, awaiting the President's signature and expected to enter into force in 2006; however a provision concerning legal persons had been deleted. Italy reported that Transparency International will be hosting a seminar in Rome in November on the OECD Convention. Norway reported on a recent a seminar for Nordic prosecutors in corruption cases in a Nordic context.

¶26. Countries absent from the Tour de Table at this meeting included: Bulgaria, Ireland, and Luxembourg, which claimed it was too busy due to its EU Presidency and could not present its mandatory follow-up report to its Phase 2 Review. As a result, the Chair suggested, per prior agreement by the WGB Management Group, that the WGB write a letter to Luxembourg expressing its disappointment and concern.

OUTREACH

¶27. There was an animated discussion of a Secretariat paper on a possible strategy regarding outreach to non-members. The paper took an expansive approach, covering outreach to possible candidates for accession to the OECD Antibribery Convention as well as those who are not on an accession path but may be interested in the Convention, and also addressing the OECD Anti-corruption Division's various regional initiatives. The UK commented that any outreach needs to be carefully targeted, first on accession candidates. For those countries that are not accession candidates, outreach might best be done on a regional basis. Australia and Argentina endorsed the UK views, noting resource constraints.

¶28. France said an important consideration is the size of the WGB -- effective monitoring and follow-up could be difficult if the WGB were to grow too large and there probably is a size limit for the group. France added that, within that limit, the WGB could identify what countries might be accession candidates, with outreach focused on those countries, although the Group should consider ways to engage other countries with no real prospect for accession. Finally, France stressed the need for a level-playing field for business from Parties to the OECD Antibribery Convention; the WGB needs to look at what to do with major players that are not Parties to the Convention, given increasing competition from businesses from non-Parties, and this need should also drive the outreach approach.

¶29. USDel noted that the U.S. shares many of the views expressed by the UK and France. USDel stressed that outreach should be based largely on those countries that are likely to meet the criteria endorsed by the OECD Council in 2004 (i.e., "willing and able" and "mutual benefit"). Summing up, Chairman Pieth said there is a clear need to really target the outreach, with the starting point being the criteria in the Council decision. He suggested the Secretariat try to develop a list of target countries, for initial review by the management group. USDel reminded delegates that the WGB had tried in the past to develop a list of priority outreach candidates, without arriving at any consensus. While the Group could proceed down this road, we could see any list as being quite short and focused. Turkey subsequently objected to any preliminary review by the management group, saying any list should be reviewed by all members at the same time. (Comment: While a "list developing" exercise is problematic, USDel believes it can be managed. End comment.)

COMMENTS ON RUSSIA'S DRAFT LAW AGAINST FOREIGN BRIBERY

¶30. The WGB considered draft comments on Russia's proposed law criminalizing the bribery of foreign public officials, drawn from written comments by several delegations and discussion at the informal side session with Russian experts at the October 2004 WGB

meeting. While the draft represented an improvement over the previous version circulated in March, it still contained a number of shortcomings and incorrect interpretations of the Convention that reflect poorly on the Secretariat, including loosely referring to corruption in general rather than focusing specifically on the bribery of foreign public officials. USDel indicated that we were not yet in a position to approve the draft, but would forward specific comments and edits shortly. The WGB discussed how to further engage Russia, given that there have been no follow-up contacts by Russian officials since Russia attended the WGB Phase 2 examination of the UK in December 2004.

SOUTH AFRICA

131. The Secretariat explained that the OECD Council had approved inviting South Africa to become part of the WGB; a draft letter inviting South Africa had been sent to the South Africans for comment. While South African officials had said they would have comments, they have yet to be received. WGB Chair Pieth expressed frustration with the slow pace of developments and urged the Secretariat to follow up with South Africa representatives in Paris.

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